

Ending the *Brown* Era: What Is the Future for Equal Educational Opportunity?

The U.S. Supreme Court's recent ruling in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) struck down the use of race in assigning students to schools to promote greater desegregation. *Seattle* means that more than 1,000 school systems that have been using race or ethnicity to make school assignments must discontinue this practice.

Seattle involved voluntary racial desegregation plans by the public school systems in Seattle, Washington, and Louisville, Kentucky. Seattle, which never operated under a court-order desegregation plan, allowed students to apply to any high school in the district. When the more popular schools became "overbooked" because they were students' first choice, the district used a system of tiebreakers to decide which students would be admitted to the popular schools. One of the tiebreakers was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predeter-

mined number of percentage points from those of Seattle's total student population, the racial tiebreaker went into effect when assigning students. Louisville, which operated a similar program, had recently been freed from judicial oversight under a desegregation plan.

The majority opinion in *Seattle* was written by Chief Justice Roberts who stated that voluntary race-based student assignment was unconstitutional under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. Justice Kennedy joined the majority but refused to sign the more restrictive opinion; instead, he signed the less-restrictive version, leaving the door open for the possible future use of race-based assignments. He shared that "diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." In his separate concurring opinion, Justice Thomas maintained that the use of race can never be justified under the Constitution, and thus, "racial balancing"



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is unconstitutional. The majority opinion drew parallels between the program used in Seattle and the de jure (legislated) segregated schooling that existed before *Brown v. Board of Education* (1954). On the other hand, Justice Breyer's dissent stated that the majority opinion betrayed the promise of *Brown*. Justice Stevens's dissent indicated that the Court had moved away from that promise.

The plaintiffs who challenged the racial diversity plan in *Seattle* filed suit under the equal protection clause. The Fourteenth Amendment, which was adopted in 1868, granted citizenship to the slaves and expanded the due process clause under the Fifth Amendment.

The majority opinion in *Seattle* held that the Constitution is "color-blind" and therefore race can never be used for such purposes. In general this is true, but the states may seek a waiver of Fourteenth Amendment provisions if they can make a "compelling" case before the Court. In instances when race is involved, the Court invokes "strict scrutiny," meaning that unless officials can show that a "compelling interest" exists in improving racial desegregation, the state must prove that it is not discriminating against the white plaintiffs because of their race.

The majority opinion maintained that it was faithful to *Brown*, referring to it more than 90 times. However, members of the National Association for the Advancement of Colored People's legal team saw no relation between their arguments against de jure segregated schooling and desegregation plans by current school districts designed to promote greater racial desegregation of public schools (Liptak 2007).

Robert L. Carter, the senior federal judge in Manhattan who argued *Brown* before the Court, disagreed with the majority about the relationship between the current programs and the situation in *Brown*. Jack Greenberg, another member of the *Brown* legal team, now a professor of law at Columbia University, calls this comparison "preposterous" and views it as a more subtle resistance to school desegregation (Liptak 2007, p. A20).

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Many consider *Brown* the greatest legal decision of the 20th century because it promoted racial equality (Sachs 2005). Yet, *Seattle*'s ban of voluntary school desegregation plans will likely increase racial and ethnic segregation in public schools and we will see a quick transition to neighborhood schools. By way of illustration, when a federal trial court in North Carolina banned race-based school assignments in the Fourth Circuit in 2000 (*Belk*), racial segregation increased almost immediately.

Shortly after the Supreme Court banned race-based pupil assignments in the Fourth Circuit, some school districts sought alternative means of achieving racial diversity. One technique used in assigning students to programs and schools is family income. Nationwide, approximately 40 school systems with about 2.5 million students use "social economic status" to diversify their student bodies. Income-

based school assignment plans are used in Baltimore, San Francisco, Wake County Schools in North Carolina, and Clark County, Nevada (Tomsho, 2007). Yet, many parents do not accept this technique.

The goal is quality education for all students, so in this post-*Brown* era, how can school officials produce quality education for all children? The use of family income in assigning students is one method, but it faces stiff resistance from many middle-class parents. Equal funding across school districts cannot be enforced (*San Antonio v. Rodriguez* 1973), and efforts to use the equal protection clauses of the states during the past 40 years have not yielded good results. Judicial restraint limits the courts in enforcing constitutional statutes, and if the court determines that violations have occurred, remedies are limited (Thro 2005).

Conclusion

In light of *Seattle* (2007), what are the options for improving education for poor children? Equal funding across school districts within a state appears not to be a viable option in federal or state courts. Thus, the remaining viable option is to seek equal funding within each individual school district (*Hobson v. Hansen* 1967). Other options such as school choice plans—magnet schools, charter schools, home schooling, vouchers, and gifted programs—will be less favored under a return to "neighborhood schools."

Given the Court's holding in *Seattle*, the fight may now shift from race-based student assignment plans to equality of educational opportunity within individual school systems. ■

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